

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CANNISTRA REALTY, LLC,

Plaintiff,

DECLARATION OF
MARGO B. LUDMER

-against-

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, ANDREW WHEELER, in his official capacity
as Administrator of the United States Environmental
Protection Agency, and ANGELA CARPENTER, in her
official capacity as Acting Director of the Emergency
and Remedial Response Division of the United States
Environmental Protection Agency, Region 2,

Defendants.

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MARGO B. LUDMER, Attorney, Office of Regional Counsel, United States
Environmental Protection Agency ("EPA"), Region II, New York, New York, pursuant to 28
U.S.C. § 1746, hereby declares and states as follows:

1. I am an attorney in the New York/Caribbean Superfund Branch of the Office of
Regional Counsel of EPA Region II in New York, New York. I am making this Declaration in
support of EPA's Memorandum of Law in Opposition to Plaintiff's Motion for a Preliminary
Injunction.

2. Unless otherwise indicated, the facts set forth herein are based on my legal
knowledge derived from my years of experience and training as an attorney at EPA Region II, as
well as my knowledge of Cannistra Realty, LLC, and the Canadian Radium and Uranium
Corporation Superfund Site ("Canadian Radium Site" or "Site") as a result of my personal
involvement with the Site, my review of EPA's regional files, conversations I have had with
EPA employees and contractors, and on knowledge and belief.

3. As an attorney, my duties include, inter alia, providing counsel to the Superfund
and Emergency Management Division ("SEMD") of EPA Region II when it undertakes response
actions concerning hazardous substances under the Comprehensive Environmental Response,
Compensation, and Liability Act ("CERCLA"), also known as the "Superfund" law, 42 U.S.C.
§ 9601 et seq. In this capacity, I have been assigned to work on various matters related to the
Superfund assessment work being conducted at and in connection with the Canadian Radium

Site in Mt. Kisco, Westchester County, New York, which consists in part of the former Canadian Radium and Uranium Corporation facility (“Canadian Radium facility”) property.

4. One of the tasks assigned to me relating to the Canadian Radium Site is to provide assistance to SEMD personnel in gaining access to properties when entry is needed to evaluate the existence and/or extent of the contamination at the Canadian Radium Site.

5. For approximately one year, SEMD has sought to obtain access to the Cannistra Realty, LLC, property (“Property”), located at 115 and 125 Kisco Avenue, Mt. Kisco, Westchester County, New York, which is located immediately adjacent to the former Canadian Radium facility property to the north. The Property is the current location of a Tesla dealership and showroom, which operates Monday through Friday, from 8:00 a.m. to 7:00 p.m.; Saturday, from 8:00 a.m. to 6:00 p.m.; and Sunday, from 11:00 a.m. to 6:00 p.m. Access to the Property is needed to perform investigatory sampling work under CERCLA.

6. EPA has a reasonable basis to believe that radioactive contamination, including the hazardous substances radium-226 and thorium-230, may have been released at the Property as a result of the historic operations of the adjacent Canadian Radium facility and the subsequent demolition of said facility several decades ago. EPA seeks to perform the following activities at the Property: (a) radon sampling, (b) non-intrusive radiological ground surveying, and (c) soil sampling. The sampling event is expected to require at most 4 to 6 days to perform.

7. On or about May 18, 2018, EPA’s On-Scene Coordinator (“OSC”) for the Canadian Radium Site, Daniel Gaughan, requested that I participate on a call with Cannistra Realty’s attorney, Joel Sachs, regarding EPA’s desired access to the Property. During this call, Mr. Gaughan and I provided Mr. Sachs with background information on the Site and the planned investigatory work that EPA sought to perform at the Property, and we indicated that we would be providing Mr. Sachs with a “Consent for Access to Property” form for him to review with his client. Mr. Sachs expressed that his client was concerned as to how the tenant at the Property, Tesla, might respond to the EPA work. Plans were made to speak again after Mr. Sachs had a chance to confer with his client.

8. On June 1, 2018, I spoke by telephone with Mr. Sachs and his partner, Nick Ward-Willis, regarding access to the Property. The attorneys stated that their client was concerned Tesla might terminate its lease of the Property as a result of EPA’s investigatory work and inquired as to whether EPA would agree to compensate or indemnify their client should this occur. I explained that EPA was simply seeking to execute its responsibilities under CERCLA, and I confirmed in writing, by email dated June 7, 2018, that EPA does not make funds available to compensate property owners in Cannistra Realty’s position, nor would EPA indemnify the Property owner, but that EPA would endeavor to perform the assessment work in as unobtrusive a manner as possible. I also stated that EPA would perform “some or all of the work during non-business hours, dependent upon the dealership’s hours of operation and EPA availability/payment of overtime compensation.” See Exhibit A.

9. On June 12, 2018, Mr. Ward-Willis informed me that the Tesla dealership operates seven days a week and that the parking lot at the Property “is occupied with a number of

vehicles that are stored, are waiting to be serviced or are customers' vehicles visiting the site." Mr. Ward-Willis proposed that the work be scheduled for just one day, when the Property is not active. He proposed that such date be the July 4 holiday. Otherwise, Mr. Ward-Willis stated, "as you can see from the schedule above and the active use of the site, it will be difficult to provide access to the site." See Exhibit B.

10. In an email response dated June 15, 2018, I provided Mr. Ward-Willis with a draft work plan, known as a Quality Assurance Project Plan or "QAPP," and explained that EPA could not limit its work to just one day on the Independence Day holiday. I further stated to Mr. Ward-Willis the following: "It may be possible for EPA to arrive at the property a few hours before the dealership opens to complete a portion of the work (e.g., placement/collection of the radon canisters). However, the remaining work will need to be completed during the dealership's normal business hours." I explained that access was needed to assess the potential presence of radiation at the Property and to investigate the possibility of associated health risks to individuals at the Property. See Exhibit C.

11. For the following two and a half months, I repeatedly requested a response from Cannistra Realty's attorneys regarding EPA access to the Property and the status of their client's execution of the "Consent for Access to Property" form. During that time, the EPA field team stood by for confirmation of their ability to mobilize. It was not until August 29, 2018, that I received a letter from Mr. Ward-Willis with what was characterized as a "proposal for access." See Exhibit D. Such proposal once again requested that EPA hold harmless and indemnify Cannistra Realty and Tesla for any loss of income or the "termination of leasehold interest by Tenant as a result of work performed on property by EPA contractor." *Id.* It further requested, inter alia, that EPA's work be limited to the extent possible to days and times when Tesla is not open for business (which, given Tesla's hours of operation, would mean at least a portion of the work would need to be performed overnight), that the work be performed in multiple mobilizations, and that the contractor provide the Property owner and Tesla with worker's compensation insurance and business interruption insurance coverage. *Id.*

12. By emails from me dated August 30 and September 5, 2018, EPA specifically rejected such pre-conditions to access, as they were treated as a denial of access pursuant to EPA Directive 9829.2 (June 5, 1987). EPA did agree to certain reasonable accommodations, including that no equipment or testing material would be stored on-site other than canisters or other small equipment in the Tesla building and that the Property would be restored to the owner's reasonable satisfaction. I asked that Cannistra Realty confirm its position that access was conditioned on all requested pre-conditions and indicated that, if so, EPA would be left with no alternative but to consider its enforcement options. See Exhibit E.

13. Following subsequent communication between the parties, Mr. Gaughan and I agreed to travel to Cannistra Realty's offices near the Property on November 1, 2018, along with a representative from EPA's contractor, for the purpose of a continued discussion with Cannistra Realty regarding access to the Property. During this meeting, Cannistra Realty continued to refuse to provide EPA access except on pre-conditions previously rejected by EPA, including specific insurance coverage, off-hours work, and multiple mobilizations (indemnification was no longer insisted upon as a pre-condition). It was my understanding and belief from my

participation in this meeting that Cannistra Realty still had not communicated with its tenant regarding the potential radiological conditions at the Property or EPA's desire to perform investigatory work.

14. Following the meeting on November 1, 2018, I received a second proposal from Nick Ward-Willis which stated that his "client's grant of access" was contingent upon, among other things, Cannistra Realty and Tesla being named as insured parties and that most of EPA's work would be performed during overnight hours with Cannistra paying for portable lights. See Exhibit F. On December 4, 2018, our Office explained again that it could not accept these pre-conditions, stating it found them unreasonable because they "will cause delay, result in additional cost, and pose additional safety concerns for our workers" and EPA would evaluate enforcement options regarding access to the Property. See Exhibit G. The Office of Regional Counsel was subsequently closed due to the federal government shutdown during the end of December 2018 and January 2019.

15. Because correspondence between the parties failed to achieve a voluntary consent to access, on March 12, 2019, EPA issued Administrative Order, Index No. CERLCA-02-2019-2009 ("Order") directing compliance with our request for access. See Exhibit H. The Order was issued pursuant to Section 104(e)(5) of CERCLA, 42 U.S.C. § 9604, as well as Section 300.400(d)(4) of the NCP, 40 CFR § 300.400(d)(4), which authorizes the issuance of a Section 104(e)(5) order if "consent [to access] is conditioned in any manner."

16. Following issuance of the Order, on March 27, 2019, Cannistra Realty's attorneys informed me by phone that their client was potentially willing to pay the additional expenses incurred by EPA should it agree to the performance of the investigatory work during non-business hours. In light of this proposal, I responded by email dated March 29, 2019, that EPA would agree to perform work over the weekend, during daytime hours, assuming the additional, associated expenses were covered by Cannistra Realty. See Exhibit I. However, on April 1, 2019, Mr. Ward-Willis sent me a letter setting forth what he described as an "aggressive schedule," which required the performance of radiological surveying and the majority of the soil sampling during evening hours over the weekend. The letter indicated that sampling in the parking lot would interfere most with Tesla's activities. See Exhibit J. Despite this restrictive proposed schedule, Mr. Sachs sent me an email on April 3, 2019, stating in part that: "[o]ur clients continue to agree to provide access and have not in any way imposed restrictions that would impede the manner or extent of EPA's work." See Exhibit K.

17. At Cannistra Realty's request, and pursuant to Paragraph 27 of the Order, a formal conference on the Order was held on April 4, 2019, at EPA's offices in New York, New York. The purpose of the formal conference, which is offered to recipients of EPA access orders, is to provide an opportunity for the respondent to explain any circumstances and provide any information it chooses to the official with delegated authority to issue the order. Gerard Burke, an attorney in EPA's Office of Regional Counsel with no involvement at the Site or with the Order, presided at the conference as a neutral officiant. Mr. Burke's role was, among other things, to communicate the substance of the issues raised at the conference to the Acting Director of SEMD (then known as the Emergency and Remedial Response Division), who had issued the Order. On April 11, 2019, Mr. Burke issued a letter informing the parties that he had consulted

with the Acting Director and that she had determined that no modifications to the Order were necessary or appropriate at the time. The letter explained that the “proposed testing appears to be minimally intrusive and designed to cause the least disruption to the tenant’s business, especially considering the anticipated limited duration of the testing.” See Exhibit L. As a result, by letter dated April 12, 2019, EPA informed Cannistra Realty that the Order would become effective on April 17, 2019. The Order required a response from Cannistra Realty within two days of the effective date as to whether it would comply with the terms of the Order; EPA did not receive such a response within the mandated response time. See Exhibit M.

18. On April 17, 2019, Cannistra Realty informed the EPA OSC, Mr. Gaughan, by email that Cannistra Realty had finally conferred with its tenant, Tesla, regarding EPA’s desired access to the Property. See Exhibit N. From that email, EPA learned of Tesla’s preference that the investigatory work be performed Monday through Thursday, rather than over a weekend, as had been previously proposed by Cannistra Realty. Tesla also apparently informed Cannistra Realty that April and May are “better months to complete the work.” Cannistra Realty reiterated that it had concerns regarding EPA’s performance of soil sampling in the parking lot, as well as on the Kisco Avenue side of the Property, because of the interference it could cause if sampling was done during Tesla’s business hours. On April 22, 2019, Cannistra Realty filed this civil action.


19. On May 17, 2019, the U.S. Attorney’s Office for the Southern District of New York, on behalf of EPA, sent a letter to Cannistra Realty’s counsel proposing a new schedule that it hoped would accommodate certain identified concerns. See Exhibit O. The proposal was based on the understanding that Cannistra Realty did not object to the radon sampling and non-intrusive radiological ground surveying being performed during business hours, and that Cannistra Realty desired that the soil sampling in the parking lot be performed during non-business hours. Cannistra Realty did not accept the proposal.

20. EPA will not enter the Property until after it obtains a court order granting it access or until Plaintiff consents. EPA does not enter properties without the voluntary consent of a property owner, compliance with an administrative access order, or a judicial warrant¹ or order. Such policy is set forth in EPA Directive 9829.2 (June 5, 1987). An administrative access order is not self-executing, and EPA does not access property based on the administrative access order alone.

I declare under penalty of perjury that the foregoing is true and accurate to the best of my knowledge and belief.

¹ In rare instances, EPA may seek a warrant, requiring judicial approval, when it is denied access to property. When EPA instead elects to gain access by issuing an administrative order (as in this case), EPA subsequently seeks to enforce that existing order in court and does not enter the property until judicial authorization is granted.

Dated: New York, New York
May 28, 2019



MARGO B. LUDMER
Assistant Regional Counsel
Office of Regional Counsel
United States EPA, Region II